Filed 7/6/10 In re T.H. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re T.H., et al., Persons Coming Under the Juvenile Court Law.	B221594 (Los Angeles County Super. Ct. No. CK 67500)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.S., et al., Defendants and Appellants.	

APPEALS from orders of the Superior Court of Los Angeles County. James K. Hahn, Judge. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant M. S.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant T.H.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Timothy M. O'Crowley, Principal Deputy County Counsel, for Plaintiff and Respondent.

Mother M.S. and father T.H. filed separate appeals from the order terminating their parental rights after a Welfare and Institutions Code section[1] 366.26 hearing. Both contend the juvenile court erred by denying their respective section 388 petitions without a hearing (mother joined father's arguments). Mother also contends the court erred by finding the sibling exception did not apply. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Petitions

On March 22, 2007, the Department of Children and Family Services (Department) filed a section 300, subdivision (b) petition on behalf of Marcel, Maurice, one-year old twins and newborn twins.[2] M.S. is the mother of all six children, and father is the biological father of both sets of twins. The court found father was the presumed father of the twins.[3] The petition alleged mother and father had a history of illicit substance abuse, the younger twins and mother tested positive for cocaine when the twins were born, and father failed to protect the children from mother's substance abuse.

For the detention hearing, the Department reported the family came to its attention when mother and the younger twins tested positive for cocaine and marijuana at the twins' birth. One twin only weighed three pounds and three ounces and suffered from respiratory distress. Mother admitted using marijuana, but denied using cocaine; she believed she had smoked marijuana not knowing it was laced with cocaine two or three days before the younger twins' birth. Mother stated father sometimes smoked marijuana.

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1 All statutory references are to the Welfare and Institutions Code.

2 As the twins all have names starting with the same initial, they are referred to as the older or younger twins. Only the two sets of twins are the subjects of this appeal.

3 The reporter's transcript states father is the presumed father of Maurice; the minute order for that date states father is the presumed father of Marcel.

Father, who was very angry and uncooperative, denied using drugs and indicated he had only seen mother use marijuana occasionally.

The court ordered the Department provide mother and father referrals for weekly drug testing, parenting and individual counseling. The court declared the children a sibling group and directed the Department to make every effort to keep them together with a relative. The court ordered monitored visits for the parents.

The Department placed the two older boys in one foster home, the older twins in a different foster home and one of the younger twins in a third foster home with the expectation his twin sister would join him after she was released from the hospital (as she subsequently did).

An amended petition added allegations that the parents physically abused Marcel subjecting the other children to a risk of harm. Marcel told the social worker (CSW) he got "whoopings" if he was bad. Mother and father had hit Marcel in the back with a belt or hanger. Mother also hit Marcel on the legs, back and chest with a closed fist. Marcel stated father and mother kept "weed" in a baggie and smoked it.

In May, the Department reported neither parent had made any effort to comply with the court orders or been in contact with the Department. Mother explained she did not have any objection to taking a drug test, but she was unavailable to do so. Neither parent had visited any of the children. Mother explained she was not visiting because it hurt her too much to visit and then leave them.

Mother and father appeared for the June 4 hearing, and the matter was continued for a mediation. In July, the Department reported mother was living in a motel, but wanted to enroll in an inpatient drug rehabilitation program where her children could be placed with her. Father was arrested on June 30 for a parole violation and remained incarcerated.

The court sustained the amended petition and ordered mother and father were to attend drug rehabilitation counseling with weekly testing, a parent education course, and individual counseling.

II. Review and Selection and Implementation Hearings

In November 2007, the Department reported mother never showed up to any of her scheduled appointments with the CSW. Mother and father had little to no contact with the children and had not complied with the case plan. Neither parent had drug tested. The court terminated family reunification services on January 9, 2008.

The court held multiple selection and implementation hearings between May 7, 2008, and January 6, 2010. The younger twins remained in the care of Jessie from the time they had been placed with her after their birth. Jessie was identified as their prospective adoptive parent and her homestudy was approved on October 30, 2009. Mother and father had little to no contact with these twins.

Jessie originally expected to have the older twins placed in her care as well so she could adopt both sets of twins, but she ultimately decided not to do so. On April 29, 2009, long term foster care was designated as the permanent plan for the older twins.

The twins all maintained a relationship with each other through monthly visits. Marcel and Maurice were ordered into a legal guardianship on December 31, 2008, but they continued to visit their younger siblings.

On June 23, 2009, the Department reported an adoptive family had been identified for the older twins. The older twins and the family were eligible for "TIES for Families Infant Mental Health program," which assists children with special needs by allowing home visits, developmental evaluation, parenting education and support groups. In August, the older twins were placed with prospective adoptive parents who had an approved homestudy.

In November 2009, the Department reported neither mother nor father had seen the younger twins in over a year. Mother had been living in a sober living home since April 2009. As part of that program, mother had to attend group and individual sessions at South Central Health and Rehabilitation Programs (SCHARP). Father was incarcerated from August 22, 2008, until August 14, 2009. By October 2009, father was

living with his sister and participating in Homeboy Industries classes and a parenting course and had taken one drug test.

Counsel for Department requested that if the parents intended to file a section 388 petition, they do so "sooner than later," and the court directed the parents to do so. When mother's counsel requested the Department file a report addressing such petitions, the court reminded the parties to file timely petitions to avoid a surprise. The court set the section 366.26 hearing (.26 hearing) for January 6, 2010.

III. Section 388 Petitions

Mother filed a section 388 petition two months later on January 4, 2010, seeking an order reinstating family reunification services for the two sets of twins based on her relationship with her children and her compliance with the case plan.

Father filed his section 388 petition on January 6 seeking return of his children or an order reinstating family reunification services based on his relationship with the twins and his compliance with the case plan.[4]

In November 2009, the Department reported the children continued to thrive in their respective placements and their respective prospective adoptive parents remained committed to adopting the children and providing them with a loving and stable home environment. Father reported he was no longer "together" with mother. Mother had moved out of the sober living home because she was not getting along with the other women in the home, but she was still participating in SCHARP services. Mother was residing in a new home, had a roommate and was two months pregnant with father's child.

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[4] Previously, father had given copies of certificates from Dynamic Family Services for anger management and drug testing results to the Department. The CSW was unable to verify the existence of the facility as there was no address or phone number on the certificates.

The parents were scheduled to visit the children on Tuesdays from 11 a.m. to 1 p.m. On November 3, only mother visited. On November 10, mother and father visited. On November 17, father did not visit and did not call to cancel; mother visited. However, during that visit, mother began a verbal disagreement with father over a cell phone. On November 24, father again did not visit and did not call to cancel; mother visited, but there were problems with the visit. Mother was upset because one twin called her prospective adoptive parent "mommy." Mother became angry and left the visit early. On November 30, father told the CSW he was not going to visit on December 1 because it was a "bad week." On December 1, only mother visited, but she arrived an hour late without explanation. Neither parent appeared at the December 8 visit or called to cancel the visit. On December 22, mother did not appear or call to cancel; father visited and brought Christmas gifts, and informed the CSW he would not be able to attend the next visit. The CSW concluded mother's contact with the children had been inconsistent and her behavior had been inappropriate at times. Father's visits also had been inconsistent and he lacked stable housing, employment and had not completed court-ordered services.

IV. .26 Hearing

The court summarily denied mother's section 388 petition finding the petition did not state a change of circumstances or promote the children's best interest. After mother's counsel argued, the court allowed mother to augment the petition with three attachments, but did not change its ruling. The court also summarily denied father's petition on the same basis although it noted father could not comply with classes while incarcerated and had requested visitation upon release. The court emphasized that even though father had been granted weekly visits, he had missed several of them. The court questioned the authenticity of one of father's documents and denied father's request to testify regarding his participation in the programs. Father stated he had not been with mother for three years.

Father testified for the contested .26 hearing. Since father's release on August 14, he had visited his children every other week for five months although he missed a few visits to attend individual counseling and NA meetings and because of the long distance between him and the children. During his visits, father brought the children gifts and food, read books to them, talked with them, asked them questions about their life and played with them. Father had a positive relationship with his children and they were always happy to see him and called him "dad" or "daddy" and hugged him at the end of the visits.

Mother testified she last visited her children two weeks before trial and was now four months pregnant with father's baby. During the two times when mother visited the children with father, the whole family got along great. Mother brought healthy snacks, braided one twin's hair, held the babies and read to the children. When the children saw mother, they smiled, ran to her and called her "mommy." Mother talked with her daughter about clothes and hair and painted her fingernails. Mother talked with her children about their activities and showered them with hugs and kisses. One twin wanted mother to hold her and another twin gave mother hugs and kisses. For the last two months, mother attended all the arranged visits except for two when she was ill.

Over the years, mother did not get to see the children as often as she wanted, only visiting about once a month because she was homeless, staying in shelters, had all of her bags with her and had no money. Mother began visiting more often after she started living in a transitional sober living home and was provided transportation. Mother had been clean and sober for over two years and is under the care of a doctor who is providing her treatment and medication for her depression.

The children's counsel joined the Department's recommendation to terminate parental rights. Father's counsel argued father had a strong relationship with his children. Mother's counsel argued the parental and sibling exceptions applied. The court found the children were adoptable and the parents had not maintained regular contact, having only visited in recent months, noting the significant gaps of time when mother and father had

not visited. The court also found there was no evidence termination of parental rights would substantially interfere with the siblings' relationship. The court terminated parental rights.

Mother and father filed timely notices of appeal from the order terminating parental rights.

DISCUSSION

I. Section 388 Petitions

Mother and father contend the court abused its discretion when it denied their section 388 petitions without a hearing. A section 388 petition requires a showing (1) that a change of circumstances warrants a change in a prior order of the juvenile court and (2) that the requested change is in the best interests of the child. (Cal. Rules of Court, rule[5] 5.570(e); *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.)

"If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. 'The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.' 'A "prima facie" showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.'" (Citations omitted.) (*In re Daijah T., supra*, 83 Cal.App.4th at p. 673.)

However, a party filing a section 388 petition is not automatically entitled to a full hearing on the motion. If the petition fails to state a change of circumstance that might require a change order, the court may deny the application ex parte. (Rule 5.570(d).) "The petition is addressed to the sound discretion of the juvenile court and its discretion will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see also *In re Jamika W.* (1997) 54 Cal.App.4th

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[5] All rule references are to the California Rules of Court.

1446, 1451 [The denial of a petition without a hearing is reviewed for an abuse of discretion keeping in mind "'the change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order.'"].) Whether a parent made a sufficient showing entitling her to a hearing "depends on the facts alleged in her petition, as well as the facts established as without dispute by the court's own file." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

In her section 388 petition, mother requested additional family reunification services based on her completion of a parenting class, enrollment in individual and drug counseling and consistent visitation with her children. Documentation attached to her petition indicated mother had completed a parenting program on November 17, 2009. Letters from the South Central Health and Rehabilitation Programs stated mother had made "some significant progress in the past three months" in addressing her depression and post-traumatic stress disorder and had twice-monthly visits with her psychiatrist, weekly meetings with her therapist and was participating in group sessions addressing anger management and healthy relationships.[6] Mother did not adduce any evidence she had drug tested or complied with the case plan's requirement she remain sober and drug free.

Mother posits her situation is similar to that in *In re Eileen A.* (2000) 84 Cal.App.4th 1248 disapproved on another point in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414, in which the court noted that the mother's attorney had not filed a section 388 petition, but the court found the mother had made a prima facie showing of ineffective assistance of counsel because had her attorney done so, it would have been "a clear winner." (*Id.*, at pp. 1260-1262.) In *Eileen*, after the court denied reunification services because of the severe physical abuse perpetuated by the father, the mother had attended parenting classes once a week and went to Al-Anon, saw an individual counselor and

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[6] Other facts cited by mother are based on her testimony at the .26 hearing after the court had denied her section 388 petition and are nor relevant as to whether that petition made a prima facie showing of changed circumstances.

never missed an appointment, attended her child's medical appointments and visited as often as allowed. (*Id*., at p. 1252.) *Eileen A.* is clearly distinguishable because prior to starting to visit in November, mother had only visited sporadically.

In his section 388 petition, father requested either the children be placed with him or he be provided with additional family reunification services. Father claimed he had completed parenting, anger management, a drug program with testing and individual counseling, was now sober, had appropriate housing and had visited the children as often as possible since his release from prison. Father attached a certificate dated October 27, 2009, of completing 10 parent education classes at Homeboy Industries, two negative drug screen reports dated October 20, 2009, and January 8, 2008, and a letter from Homeboy Industries stating he had enrolled in an anger management class and attended one session. Also attached was a January 9, 2008, letter from Watts Health Corporation (which offered services to individuals with drug-related dysfunctions) stating father had entered the program on December 31, 2007, and sign in sheets showing he had attended almost daily drug/alcohol meetings from September through November 2009.

Father asserts his petition was similar to one at issue in *In re Aljamie D*. (2000) 84 Cal.App.4th 424, 432, where the Court of Appeal reversed the juvenile court's ex parte denial of a section 388 petition as the mother had completed numerous classes, tested clean in weekly tests for two years, visited her children regularly and had a strong bond with them. *Aljamie D.* is also clearly distinguishable. In this case, even after his release from custody, father had not visited regularly and any bond he had formed was recent. Father's only recent drug test was from October 2009 and there was no proof he had completed the drug program he had entered in December 2007, a six- to nine-month program which could even last up to eighteen months.

The twins were detained in March 2007. Although father was incarcerated twice during the dependency, as the court noted when terminating reunification services, he did nothing in the three months prior to his first incarceration. Moreover, father's claim in

his January 2010 petition that he had stable housing was a very recent development. In November 2009, the CSW reported father lacked stable housing and employment.

Although both parents had made improvements in their personal life, neither had a strong bond with the twins; they had just started visiting with the twins. Despite his claim of visiting regularly since his release from custody, father missed or cancelled a number of visits. Even though father offered some explanation of why he missed visits at the .26 hearing, he did not explain why he did not change his visits or other appointments so they did not conflict. Mother, who did not start visiting with any consistency until November 2009, also missed, cancelled or came late to visits and behaved inappropriately during the visits -- becoming angry with father on the phone or leaving early when one twin called the prospective adoptive parent "mommy." At best, the petitions alleged changing, rather than changed circumstances. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 47-49 [""[C]hildhood does not wait for the parent to become adequate.""].)

Neither mother nor father adduced any evidence of an ability to presently provide suitable care for the twins; rather they were asking for services to aid them in providing care. (See *In re Angel B.*, *supra*, 97 Cal.App.4th at p. 462.) "After the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount. Rather, at this point, the focus shifts to the needs of the child for permanency and stability." (Citation omitted.) (*Id*., at p. 464.)

As one court reasoned: "At this point in the proceedings, on the eve of the selection and implementation hearing, the children's interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification. Mother made no showing how it would be the children's best interest to continue reunification services, to remove them from their comfortable and secure placement to live with mother who has a long history of drug addiction and a recurring pattern of domestic violence in front of the children. The children should not be made to wait indefinitely for

mother to become an adequate parent." (Citations omitted.) (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251-252.)

As noted in *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081: "Their recent efforts at rehabilitation were only three months old at the time of the section 366.26 hearing. Although parents were exerting themselves considerably to improve, they did not demonstrate changed circumstances. Even if parents had succeeded in doing so, there was no showing whatsoever of how the best interests of these young children would be served by depriving them of a permanent, stable home in exchange for an uncertain future." (Citations omitted.)

Father contends the court erred by requiring his improvement had to cover the entire two year period from the January 2008 termination of parental rights.[7] Not so, in order to analyze whether changed circumstance existed, the court considered what the original circumstances were; it did not find the improvements had to have taken place for two years. In addition, the court did not err in refusing to allow father to testify about the programs in which he was participating as the issue was whether the petition made a prima facie showing of changed circumstances. The court did not deny the petition based on the lack of participation in programs but on father's failure to visit.[8]

Thus, given three years of dependency proceedings, the young age of the twins (four and three years old) and the very recent efforts by the parents, even though one set of twins had only recently been placed with a prospective adoptive family, the court did not abuse its discretion when it denied the section 388 petitions without a hearing as the petitions did not demonstrate a significant change in circumstances.

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[7] The court terminated reunification services in January 2008, not parental rights.

[8] Father asserts he was unable to address the Department's statement he had missed several visits due to its filing a late report. The court ordered the parents to file their section 388 petitions in a timely manner; both parents waited two months until two days before and the day of the scheduled .26 hearing to file their petitions so the Department was unable to file a report directly addressing their petitions.

II. Sibling Exception

Mother contends the court erred in finding the section 366.26, subdivision (c)(1)(B)(v) exception did not apply. This finding is reviewed for substantial evidence. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) The burden of demonstrating the exception applied was on mother. (See *In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

This exception "provides that if the parent makes a sufficient evidentiary showing, the court must consider the nature and extent of the sibling relationship, 'including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.'" (Citation omitted.) (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at p. 951.)

The court further explained: "To show a substantial interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child. Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment on termination, there is no substantial interference with that relationship. . . . [¶] Moreover, even if a sibling relationship exists that is so strong that its severance would cause the child detriment, the court then weighs the benefit to the child of continuing the sibling relationship against the benefit to the child adoption would provide." (Fn. omitted.) (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 952-953.)

Mother asserts the termination of her parental rights will substantially interfere with the older twins' relationship with the younger twins (and their two older siblings) as they had maintained visits with each other, recognized each other as siblings and loved each other very much. Although the two sets of twins had visits with each other, the

younger twins were not raised in the same home as the other children, but were placed in foster care immediately after they were born (or released from the hospital). The older twins were two years old when they were placed in foster care. At the time of the disposition hearing, the older twins were almost four years old and the younger twins were almost three years old. (See *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014 ["[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount."].) Furthermore, mother adduced no evidence either set of twins would suffer detriment if separated from their siblings or had a strong relationship with them. (See *In re Megan S.*, *supra*, 104 Cal.App.4th at pp. 251-252.)

DISPOSITION

The orders denying the section 388 petitions and terminating parental rights are affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.